11

That of the dividend distributed by the Foster Lumber Company on February 10, 1914, in the amount of $100,000.00, [fol. 6] the sum of $42,377.71 was paid from earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913.

12

That of the dividend distributed by the Foster Lumber Company on February 9, 1915, in the amount of $100,000.00, the sum of $51,560.66 was paid from earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913.

13

That the dividends distributed by the Foster Lumber Company from 1916 to and inclusive of February 12, 1929, were distributed from earnings and profits accumulated subsequent to March 1, 1913.

14

That on October 12, 1929, the Foster Lumber Company distributed a dividend in the amount of $975,000.00. The earnings or profits accumulated from March 1, 1913 to October 12, 1929, and not distributed by the said corporation were insufficient from which to pay the distribution of October 12, 1929, and a large part of such distribution to-wit, $559,696.00, was paid from earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913.

15

The earnings of the Foster Lumber Company from October 10, 1929 to December 31, 1929, available for distribution were $60,261.71 and the earnings of the said corporation from January 1, 1930 to February 11, 1930, available for distribution were $22,143.03.

[fol. 7]

16

The plaintiff in this action contends that all of the earnings and profits of the Foster Lumber Company which had accumulated from March 1, 1913 to October 10, 1929, had been distributed on October 10, 1929, and that the only

earnings or profits available for distribution on February 11, 1930, were the amounts of $60,261.71 accumulated from October 10, 1929 to December 31, 1929, and $22,143.03 accumulated from January 1, 1930 to February 11, 1930, or a total amount of $82,404.74; and that of the dividend distributed by the Foster Lumber Company in the amount of $225,000.00 on February 11, 1930, the amount of $142,595.26 was paid from its earnings and profits accumulated, or increase in value of its property accrued, before March 1, 1913, which said amount of $142,595,26 was nontaxable to the recipients thereof in accordance with the relevant provisions of section 115 of the Revenue Act of 1928, 45 Stat. 822, which provides as follows:

"(a) Definition of Dividends.—The term 'dividend' when used in this title (except in section 203 (a) (4) and section 208 (c) (1), relating to insurance companies) means any distribution made by a corporation to its shareholders, whether in money or in other property, out of its earnings or profits accumulated after February 28, 1913.

(b) Source of Distributions.—For the purpose of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits. Any earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913, may be distributed exempt from tax, after the earn- [fol. 8] ings and profits accumulated after February 28, 1913, have been distributed, but any such tax free distribution shall be applied against and reduce the basis of the stock provided in Section 113."

17

The plaintiff further contends that of the amount of $23,250.00 reported by her in her income tax return for the calendar year 1930 as a taxable dividend received from the Foster Lumber Company from the said corporation's distribution on February 11, 1930, the amount of $14,734.84 was paid from the accumulated earnings and profits and increase in value of property accrued, before March 1, 1913, of the said Foster Lumber Company and is nontaxable in accordance with the above stated provisions of section 115 of the Revenue Act of 1928 as being distributed

from earnings or profits accumulated, or increase in value of property accrued, before March 1, 1913.

18

That by deducting the amount of $14,734.84 from the amount of the dividend of $23,250.00 erroneously reported as taxable in the plaintiff's income tax return for 1930 and recomputing the amount of the income tax on the resultant corrected income, a tax liability of $109.68 and an overpayment of $740.60 are determined.

19

That the whole said sum of $740.60 is now wrongfully and unlawfully retained and held from the plaintiff without her consent and against her will by the United States of America.

[fol. 9] 20

Petitioner further represents that she is a citizen of the United States and has at all times borne true allegiance to the Government of the United States and has not in any way voluntarily aided, abetted or given encouragement to rebellion against said Government, and that she is the sole and absolute owner of the claim herewith presented; that she has made no transfer or assignment of said claim, or of any part thereof, and that petitioner is justly entitled to the amounts claimed herein from the United States after allowing all just credits and set-offs.

Petitioner, therefore, prays for judgment in her favor and against the United States of America for the said sum of $740.60, with interest thereon from March 12, 1931, together with the costs and disbursements of this action, and for such other and further relief as to this honorable court may seem just and proper.

C. Clifton Owens, Attorney for Plaintiff, American Security Building, Washington, D. C.

[fol. 10] *Duly sworn to by C. Clifton Owens. Jurat omitted in printing.*

[fol. 11] II. General Traverse—Filed May 26, 1934

And now comes the Attorney General, on behalf of the United States, and answering the petition of the plaintiff herein, denies each and every allegation therein contained; and asks judgment that the petition be dismissed.

Frank J. Wideman, Assistant Attorney General.

III. Substitution of Parties Plaintiff

On motion made therefor on July 8, 1936, and allowed by the court July 21, 1936, Benjamin B. Foster and Robert R. Todd, Executors of the Estate of Anna Foster Ford, deceased, were substituted as parties plaintiff.

IV. Argument and Submission of Case

On October 6 and 7, 1936, this case was argued and submitted on merits by Mr. Hugh C. Bickford, for plaintiffs, and by Mr. George H. Foster, for defendant.

[fol. 12] V. **Special Findings of Fact, Conclusion of Law and Opinion of the Court by Green, J.**—Filed December 7, 1936

Mr. Hugh C. Bickford for plaintiffs. Mr. C. Clifton Owens was on the briefs.

Mr. George H. Foster, with whom was Mr. Assistant Attorney General Robert H. Jackson, for defendant.

This case having been heard by the Court of Claims, the court, pursuant to the stipulation of the parties, makes the following

Special Findings of Fact

1. Anna Foster Ford, who was originally the plaintiff in this case, died March 30, 1936, and Benjamin B. Foster and Robert R. Todd, executors of her estate, have been substituted as plaintiffs.

2. March 12, 1931, the decedent filed her income tax return for the calendar year 1930 and reported therein a tax-

able net income of $29,697.29 and a tax liability thereon of $850.28, which she paid at the time of filing the return.

3. The decedent was, on February 11, 1930, the owner of record of 155 shares of a par value of $100 per share of the total of 1,500 shares of the capital stock of the Foster Lumber Company, a Missouri Corporation. She acquired this stock prior to March 1, 1913, at a cost less than the March 1, 1913, value, which March 1, 1913, value it is agreed was at least $2,000 per share. The Foster Lumber Company [fol. 13] on February 11, 1930, duly declared a cash dividend of 150 per cent of its capital stock payable on that date to all stockholders of record on that date. The decedent received during the calendar year 1930 the amount of $23,250.00 from the Foster Lumber Company in payment of the said dividend of February 11, 1930, on the 155 shares of stock owned by her. The entire amount of this dividend of $23,250.00 received by her during 1930 was included in the individual income tax return filed by her for that year as income and a tax paid thereon.

4. On July 18, 1932, the decedent filed with the Collector of Internal Revenue at Kansas City, Missouri, a claim for the refund of $712.01 of the income tax paid by her for the year 1930. This claim was predicated on the basis that of the dividend of $23,250.00 received by her from the Foster Lumber Company during 1930 and reported as taxable in its entirety the amount of $14,754.22 was paid out of surplus accumulated or appreciation of land and timber arising before March 1, 1913, and was to that extent and for that reason exempt from tax. The Commissioner of Internal Revenue rejected the said claim for refund on September 21, 1933.

5. The Foster Lumber Company was a Missouri Corporation which had issued 2,000 shares of common stock having a par value of $100 each. It was formed for the purpose of manufacturing, buying, and selling lumber, building material, and merchandise generally; also for buying, selling, and leasing lands. On March 1, 1913, the earnings or profits accumulated and increase in value of property owned by the company were in excess of $3,725,000.

6. The following tabulation sets forth with reference to the Foster Lumber Company, in column "A" the period

involved, in column "B" the amount of the earnings, or profits for that period, in column "C" the amount of the dividend distributed on the last day of the indicated period and in column "D" the balance of the earnings, or profits accumulated subsequent to February 28, 1913:

[fol. 14]

"A" Period	"B" Earnings or Profits	"C" Distributions	"D" Balance of Earnings or Profits Accumulated Since February 28, 1913
Mch. 1, 1913 to Dec. 31, 1913	$54,488.12	none	$54,488.12
Jan. 1, 1914 to Feb. 10, 1914	3,322.90	$100,000.00	none
Feb. 10, 1914 to Dec. 31, 1914	26,998.60	none	26,998.60
Jan. 1, 1915 to Feb. 9, 1915	21,800.13	100,000.00	none
Feb. 9, 1915 to Dec. 31, 1915	182,226.72	none	182,226.72
Jan. 1, 1916 to Feb. 8, 1916	38,890.35	200,000.00	21,117.07
Feb. 8, 1916 to Dec. 31, 1916	335,685.13	none	356,802.20
Jan. 1, 1917 to Feb. 13, 1917	52,944.91	300,000.00	109,747.11
Feb. 13, 1917 to Mch. 16, 1917	38,169.59	50,000.00	97,916.70
Mch. 16, 1917 to Dec. 31, 1917	358,301.60	none	456,218.30
Jan. 1, 1918 to Feb. 12, 1918	34,852.96	300,000.00	191,071.26
Feb. 12, 1918 to Jun. 22, 1918	107,878.22	100,000.00	198,949.48
Jun. 22, 1918 to Oct. 2, 1918	84,642.91	80,852.20	202,740.19
Oct. 2, 1918 to Dec. 31, 1918	75,514.77	none	278,254.96
Jan. 1, 1919 to Feb. 11, 1919	55,306.55	300,000.00	33,561.51
Feb. 11, 1919 to Dec. 31, 1919	437,056.62	none	470,618.13
Jan. 1, 1920 to Feb. 10, 1920	51,764.03	300,000.00	222,382.16
Feb. 10, 1920 to Dec. 31, 1920	421,876.82	none	644,258.98
Jan. 1, 1921 to Feb. 8, 1921	3,269.75	200,000.00	447,528.73
Feb. 8, 1921 to Dec. 31, 1921	28,137.05	none	475,665.78
Jan. 1, 1922 to Feb. 14, 1922	25,585.23	200,000.00	301,251.01
Feb. 14, 1922 to Dec. 31, 1922	186,655.92	none	487,906.93
Jan. 1, 1923 to Feb. 13, 1923	19,938.46	300,000.00	207,845.39
Feb. 13, 1923 to Dec. 31, 1923	149,306.62	none	357,152.01
Jan. 1, 1924 to Feb. 12, 1924	20,649.83	200,000.00	177,801.84
Feb. 12, 1924 to Dec. 31, 1924	159,298.68	none	337,100.52
Jan. 1, 1925 to Feb. 10, 1925	36,057.51	250,000.00	123,158.03
Feb. 10, 1925 to Dec. 31, 1925	292,967.27	none	416,125.30
Jan. 1, 1926 to Feb. 9, 1926	29,521.05	300,000.00	145,646.35
Feb. 9, 1926 to Dec. 31, 1926	246,765.70	none	392,412.05
Jan. 1, 1927 to Feb. 8, 1927	25,195.83	300,000.00	117,607.88
Feb. 8, 1927 to Dec. 31, 1927	216,816.76	none	334,424.64
Jan. 1, 1928 to Feb. 14, 1928	34,957.28	250,000.00	119,381.92
Feb. 14, 1928 to Dec. 31, 1928	255,823.73	none	375,205.65
Jan. 1, 1929 to Feb. 12, 1929	30,587.52	350,000.00	155,793.17
Feb. 12, 1929 to Oct. 10, 1929	174,785.81	975,000.00	none
Oct. 10, 1929 to Dec. 31, 1929	60,446.75	none	In issue
Jan. 1, 1930 to Feb. 11, 1930	22,311.42	225,000.00	In issue
Feb. 11, 1930 to Dec. 31, 1930	176,314.60	none	In issue

7. At the time of the declaration and payment by the Foster Lumber Company of the dividend of $100,000.00 on February 10, 1914, its earnings and profits accumulated subsequent to February 28, 1913, were but $57,811.02.

8. At the time of the declaration and payment by the Foster Lumber Company of the dividend of $100,000.00 on

February 9, 1915, its earnings and profits accumulated subsequent to February 28, 1913, and not distributed were but $48,798.73.

9. The dividends distributed by the Foster Lumber Company from 1916 to, and inclusive of, February 12, 1929, were distributed from earnings and profits accumulated subsequent to February 28, 1913.

[fol. 15] 10. The capital stock of the Foster Lumber Company has always been owned by members of the Foster family. Three members of the family who had removed to California were stockholders in the corporation, and in order that they might retire from ownership of and participation in the affairs of the corporation and also that a rearrangement of interests might be effected it was decided to retire and cancel 500 shares of the company's capital stock. Accordingly, under date of July 20th, 1929, the Foster Lumber Company by formal written notice to all of its stockholders requested that each of them notify it if they were in favor of a reduction in the capital stock of the company from $200,000.00 to $150,000.00 by the acquisition and cancellation by the company of 500 shares of its outstanding capital stock of 2,000 shares from the therein named stockholders in the proportions and for the amounts set forth in that letter.

11. On October 1, 1929, a meeting of the stockholders of the Foster Lumber Company was held and a resolution adopted providing for the reduction of the capital stock of the company from $200,000 divided into 2,000 shares to $150,000 divided into 1,500 shares, and on October 8, 1929, the company having complied with the laws of the State of Missouri providing for the decrease of capital stock, the Secretary of State certified to the decrease therein to the amount of $150,000.

12. On October 10, 1929, the Foster Lumber Company distributed $1,025,000 in cash to its stockholders for 500 shares of its capital stock retired on that date pursuant to the proceedings above recited. On the books of the corporation, $975,000 of the amount distributed was charged to surplus and $50,000 to the capital stock account. The stock retired was immediately canceled. This distribution was on the basis of $2,050 per share and subsequently it was agreed between the stockholders and the defendant that the

value of the stock on March 1, 1913, was $2,050 per share and that no taxable income was determined as arising out of the retirement of the stock in 1929.

13. On February 12, 1929, and immediately after the payment of the cash dividend made on that date in the amount of $250,000.00 the remaining balance of earnings and profits [fol. 16] accumulated by the Foster Lumber Company since February 28, 1913, was $155,793.17. The earnings and profits of that corporation for the period from February 12, 1929, to October 10, 1929, were $174,785.81.

14. The earnings and profits of the Foster Lumber Company on October 10, 1929, prior to the distribution of $1,025,000.00 on that date, which had been accumulated since February 28, 1913, were $330,578.98.

15. The accumulated earnings or profits of the Foster Lumber Company for the period from October 10, 1929, to February 11, 1930, and prior to the cash distribution of $225,000.00 on the latter date by that company were $82,758.17.

Conclusion of Law

Upon the foregoing special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover, and it is therefore ordered that their petition be dismissed.

Judgment is rendered against the plaintiffs in favor of the United States for the cost of printing the record in this case, the amount thereof to be ascertained by the clerk and collected by him according to law.

Opinion

Green, Judge, delivered the opinion of the court:

The plaintiffs, claiming that the decedent in her lifetime overpaid her taxes for the year 1930, bring this suit to recover the alleged overpayment, being $740.60 together with interest from March 12, 1931. There is no dispute as to the facts.

For the calendar year 1930 the decedent filed a return stating her taxable income to be $29,697.29 and paid the tax thereon. Included in decedent's reported income was the sum of $23,250 received from the Foster Lumber Company

as dividends on 155 shares of stock of that company owned by her. This was out of a dividend of $225,000 declared on February 11, 1930.

[fol. 17] Plaintiffs claim that $14,754.22 included in the dividend of $23,250 was paid by the company out of surplus accumulated prior to March 1, 1913, and hence was exempt from tax. The Commissioner of Internal Revenue rejected this claim and the decedent having filed a claim for refund which was also denied, brought this suit.

The Foster Lumber Company was organized in 1896 and up to 1929 its capital stock consisted of 2,000 shares of the par value of $100 per share. On March 1, 1913, its earnings and surplus were in excess of $3,725,000. On October 10, 1929, having determined to retire 500 shares of the capital stock, the company paid in cash to its stockholders $1,025,000 and 500 shares of the stock were surrendered to the company for cancellation. Of this sum $975,000 was charged to surplus and $50,000 was charged to capital stock.

The plaintiffs rely on section 115 (b) of the revenue act of 1928 which provides that—

> For the purposes of this Act every distribution is made out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits.

It is contended that this provision is controlling here and that consequently the distribution made on October 10, 1929, must be treated as made out of earnings or profits accumulated since February 28, 1913, to the extent thereof. As the amount of such earnings remaining undistributed at that time was only $330,578.98, it is plain that if this rule is applied the distribution would more than absorb all of this amount leaving nothing to be carried over to the next year.

In the interval from October 10, 1929, to February 11, 1930, when $225,000 was distributed, the corporation accumulated $82,758.17 and plaintiffs claim that this was all which was distributed on the date last mentioned out of earnings and profits accumulated since February 28, 1913. If this is correct, the remainder of the dividend, $142,241.83, was not subject to income tax when it came into the hands of the stockholders and the Commissioner erred in holding to the contrary and in refusing to allow the decedent's claim for a proportionate reduction in her income tax for that year.

[fol. 18] The defendant, on the other hand, contends that the distribution made in 1929 constituted an exception to the general rule expressed in section 115 (b) and is covered by a provision in 115 (c) which reads as follows:

In the case of amounts distributed in partial liquidation * * * the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subsection (b) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

It will be seen that the ultimate issue between the parties is whether the distribution of 1929 was "properly chargeable to capital account."

In determining the question thus presented the nature of the distribution must first be considered.

Clearly the distribution was not a dividend, either in the special sense that the word is used in the statute as defined in section 115 (a), or in its meaning as generally used, which is somewhat broader. The definition set out in the statute was evidently inserted to make sure that there could be no claim that a distribution made out of profits was not a dividend. The distinction between a dividend and such a distribution as is made in the case before us is quite plain. When a dividend is made, the stockholder receives something but pays nothing. In the case at bar, the stockholder received money from the corporation but gave what may be considered as full value for what she received. Neither the stockholder nor the corporation had gained by the transaction. We think that if profits were distributed, as is now claimed by the plaintiffs, the stockholder would not have been required to pay for what she received. What the corporation turned over to the stockholders was the value of their stock which appears to be the same as on March 1, 1913. This is treated by the law as a basis of the determination of gain or loss to the stockholder in the transaction, and we think it is so treated on the ground that earnings or profits accumulated prior to that date constituted for tax purposes the capital of the taxpayer. When the stockholders obtained the March 1, 1913, value of their stock, it was the realization of capital, and was properly chargeable to capital account.

[fol. 19] A consideration of the purpose of section 115 (c) of the act of 1928 and the reports made by the committees of the House and Senate when it first became a part of the revenue law supports the view above expressed. As the law originally stood, the plan devised in the case before us could be carried out so that the earnings and profits accumulated since 1913 would be distributed tax free. The general provisions of 115 (b), which were in the former act, would have required the distribution to be treated as made out of earnings or profits accumulated after February 28, 1913, and the distribution would be properly chargeable to surplus and paid out of such profits with the result that the distribution made October 10, 1929, absorbed all of the earnings and profits to that date. Obviously this would enable the stockholders to escape taxation although they had received earnings and profits which had accumulated since February 28, 1913. To prevent this avoidance of taxes, what is now section 115 (c) of the revenue act of 1928 was inserted in the revenue act of 1924 as section 201 (c). This new provision stated an exception to section 115 (b), namey a case where the distribution was "properly chargeable to capital account." When the 1924 act was reported, the reports on the bill made by both the Senate and House Committees contained the following statement:

> The theory of liquidating dividends is extended to distributions in partial liquidation. If a corporation retires a portion of its capital stock, the transaction is treated, from the point of view of the stockholder, as a sale of his stock. If the corporation distributes an amount in partial retirement of its capital stock, the amount thereof is *to be considered as a return of capital* and taxable only if, as, and to the extent that it exceeds the basis of the stock. [Italics ours.]

In the case before us, the corporation distributed an amount in partial retirement of its capital stock and, as stated in the report, this is "considered as a return of capital." Money paid out in making a return of capital is "properly chargeable to capital account." It is true that the reports presented the matter "from the point of view of the stockholder", but the principle is the same when applied to the corporation. The distribution came within

[fol. 20] the provisions of 115 (c), being properly chargeable to capital account, and consequently was not to be considered as a distribution of profits under 115 (b).

If the distribution of 1929 was charged to capital account, as it should be according to what we have held above, the profits which had accrued since 1913 and then on hand would not be depleted thereby. When the 1930 distribution was made, then, under the provisions of 115 (b), it would be paid out of these profits to the extent thereof. When the decedent received her share of these profits, the Commissioner rightly held that she was taxable thereon.

The petition must be dismissed and it is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 21] VI. JUDGMENT

At a Court of Claims held in the City of Washington on the 7th day of December, A. D., 1936, judgment was ordered to be entered as follows:

Upon the special findings of fact, which are made part of the judgment herein, the court decides, as a conclusion of law, that the plaintiffs are not entitled to recover.

It is Therefore Adjudged and Ordered that the plaintiffs' petition be and the same is hereby dismissed.

VII. PROCEEDINGS AFTER ENTRY OF JUDGMENT

On February 5, 1937, the plaintiffs filed a motion for a new trial.

On April 5, 1937, the Court, by Green, J., filed the following opinion on said motion:

[fol. 22] VIII. OPINION BY GREEN, J., ON PLAINTIFFS' MOTION FOR NEW TRIAL—Filed April 5, 1937

GREEN, Judge, delivered the opinion of the court:

In the argument in support of the motion for new trial it is strenuously insisted that the decision of the court is contrary to the rule laid down in a decision by the Supreme Court, one made by the Circuit Court of Appeals for the Second Circuit, and also another by the Board of Tax Ap-

peals. As no reference was made to these cases in the original opinion, it is thought best to show why the court did not mention them.

Special reliance is placed upon the case of Helvering v. Canfield, 291 U. S. 163, and it will be admitted that the opinion in the case at bar is not in accord with some statements found in the opinion of the Supreme Court in that case, but the reason is plain. We have before us a different act imposing a different rule. The decision in the case just cited was made under the provisions of section 201 (b) of the revenue act of 1921[1]; the holding in the case at bar is [fol. 23] based upon the special provision contained in the act of 1924 [201 (c)] which was inserted for the purpose of making an exception to the provisions of the law that controlled the Canfield case, supra. In fact it could have been inserted for no other purpose and is otherwise meaningless. Counsel quote from the opinion of the Supreme Court in the last named case the following:

> Nor is it important that the accumulated profits, as they stood on March 1, 1913, constituted capital of the company as distinguished from the gains or income which the company subsequently realized.

Clearly it was not as the statute then stood, but it is now in such cases as the one we have before us. Section 201 (c) of the 1924 act provided that—

> (c) Amounts distributed in complete liquidation of a corporation shall be treated as in full payment in exchange for the stock, and amounts distributed in partial liquidation of

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[1] The changes made in the revenue acts have led to some confusion in applying the statutes. The 1918 act contained a provision that "amounts distributed in the liquidation of a corporation shall be treated as payment in exchange for stock or shares." For some reason this provision was omitted in the 1921 act under which the Canfield case was decided; but it was restored in the 1924 act with some amplification as shown in the quotation from that statute. It is still in force under a different section number. In the 1924 act the part material to the case under consideration was designated as section 201 (a), (b), and (c). In the 1928 act, it is marked section 115 (a), (b), and (c).

a corporation shall be treated as in part or full payment in exchange for the stock. * * * In the case of amounts distributed in partial liquidation * * * the part of such distribution which is properly chargeable to capital account shall not be considered a distribution of earnings or profits within the meaning of subdivision (b) of this section for the purpose of determining the taxability of subsequent distributions by the corporation.

In the case at bar it is conceded that there was a distribution in partial liquidation, which the statute says "shall be treated as in part or full payment in exchange for the stock", and further that if it is "properly chargeable to capital account" it shall not be considered as "within the meaning of subdivision (b)" upon which the plaintiffs rely.

In support of their argument that the distribution of 1929 was not "properly chargeable to capital account", counsel for plaintiffs quote further from the opinion of the Supreme Court—

When a corporation continued in business after March 1, 1913, the dividends it later declared and paid to its stockholders, whether out of current earnings or from profits accumulated prior to that date, constituted income to the stockholders, and not capital, and were taxable as income if the Congress saw fit to impose the tax.

[fol. 24] But in the Canfield case from which this quotation was taken, the Supreme Court was applying the 1921 act to "dividends." In the instant case we must apply the 1924 statute to an "amount distributed in partial liquidation" which, like amounts distributed in complete liquidation, to the extent of the distribution must be "treated as in full payment in exchange for the stock." Payments for stock are chargeable to capital account.

The case of John B. Stewart v. Commissioner, 29 B. T. A. 809, also, in our opinion, has no application. It is necessarily taken out of the special provision above quoted by the fact that the Board held that the distribution then under discussion was not "a distribution in partial liquidation" but a dividend and controlled by subdivision (b) of section 115 of the act of 1928. The plaintiffs also cite the case of Horrmann v. Commissioner, 34 B. T. A. 1178, wherein it is said that "the 'capital account' referred to by the statute

is not increased by the issuance of a nontaxable stock dividend, but comprises only the paid-in capital." We are not disposed to agree with the construction which counsel place upon this statement but it is immaterial because the instant case does not involve any stock dividend and the Supreme Court has held that stock dividends are not a distribution. The case last cited is quite complicated in its facts and to review it fully would unduly extend this opinion. We agree with the holding made in the opinion that "normally the redemption of stock is a return of capital", and also that "as an accounting matter the whole would be charged against capital", but are not disposed to agree as to all that is said in the opinion with reference to the meaning of the statute under discussion. The case of Harter v. Helvering, 79 Fed. (2d) 12, did not involve a "distribution in partial liquidation" and consequently what is said therein has no application here.

The case of Hellmich v. Hellman,[2] 276 U. S. 233, is not cited by either party. Possibly this failure is due to the fact that the ultimate question in the case is not the one which is now before this court, but in the course of its opinion [fol. 25] the court in effect ruled on the matter now in controversy. In this case it was held that—

> * * * the general definition of a dividend in § 201 (a) was not intended to apply to distributions made to stockholders in the liquidation of a corporation, but that it was intended that such distributions should be governed by § 201 (c), which, dealing specifically with such liquidation, provided that the amounts distributed should "be treated as payments in exchange for stock" * * *.

In Klein on Income Taxation, par. 10:18 (a), it is said that—

> Under this rule [as stated in Hellmich v. Hellman, supra] it does not matter that part of the liquidating dividend came from accumulated earnings. The transaction is treated in its entirety as a capital transaction.

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[2] This case was decided under the 1918 act. See note 1 for the provision therein with reference to amounts distributed in liquidation.

Being a capital transaction, the payments made would be chargeable to capital account and under the statute could not be considered in "determining the taxability of subsequent distributions."

The Board of Tax Appeals on March 15, 1937, entered a memorandum opinion in the case of Craig, Executor, v. Commissioner, which involved the same facts and pertained to the same estate as the case at bar. The decision rendered was in accordance with the contentions of the plaintiffs made in the case now before this court and was contrary to the views which we have expressed above. As the reasoning upon which this opinion was based is not expressed, we can only say that we do not concur.

Our conclusion is that the motion for new trial must be overruled, and it is so ordered.

Whaley, Judge; Williams, Judge; Littleton, Judge; and Booth, Chief Justice, concur.

[fol. 26] IX. Order Overruling Plaintiffs' Motion for New Trial

It is Ordered this 5th day of April, A. D., 1937, that the plaintiffs' motion for new trial be and the same is hereby overruled.

[fol. 27] Clerk's certificate to foregoing transcript omitted in printing.

Endorsed on cover: File No. 41,670. Court of Claims. Term No. 189. Benjamin B. Foster and Robert R. Todd, Executors of the Estate of Anna Foster Ford, Deceased, petitioner, vs. The United States. Petition for a writ of certiorari and exhibit thereto. Filed July 2, 1937. Term No. 189, O. T., 1937.

[fol. 28] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 11, 1937

The petition herein for a writ of certiorari to the Court of Claims is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Black took no part in the consideration and decision of this application.

(2417)